

X. Related Proceedings Appendix

**Exhibit A** – Board’s decision on prior appeal, August 3, 3009. (Appeal 2009-004276)

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JOHN MELVIN and KENNETH CARVER II<sup>1</sup>

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Appeal 2009-004276  
Application 10/711,787  
Technology Center 3700

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Decided: <sup>2</sup> August 3, 2009

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Before JAMES T. MOORE, *Vice Chief Administrative Patent Judge*, and  
JAMESON LEE and SALLY C. MEDLEY, *Administrative Patent Judges*.

MOORE, *Vice Chief Administrative Patent Judge*.

DECISION ON APPEAL

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<sup>1</sup> The real parties in interest are John Melvin and Kenneth Carver II. (App. Br. 2).

<sup>2</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 CFR § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from Mail Date (paper delivery) or Notification Date (electronic delivery).

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STATEMENT OF THE CASE

The Appellants appeal under 35 U.S.C. § 134 (2002) from a final rejection of claims 1-2.<sup>3</sup> We have jurisdiction under 35 U.S.C. § 6(b) (2008).

The Appellants' claims are directed to a method for on-site transfilling gas canisters.

Claim 1 is the only independent claim in the application. The Appellants do not argue any claims or rejections separately. Therefore, we select independent claim 1 to decide the appeal. *See* 37 C.F.R. § 41.37(c)(1)(vii) (2006). Accordingly, the remaining claims stand or fall with claim 1.

Claim 1 reads as follows:

1. A method for transfilling gas canisters on-site comprising:  
transporting a transfilling station to a desired transfilling site;  
attaching gas canisters to said transfilling station;  
inspecting and evacuating said gas canisters;  
vaporizing and compressing a gas and directing it into said gas canisters;  
disconnecting said gas canisters; and  
transporting said transfilling station from said transfilling site.  
(App. Br. 9, Claims App'x.).

THE EVIDENCE

The Examiner relies upon the following as evidence in support of the rejections:

Mattiola	4,881,375	Nov. 21, 1989
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<sup>3</sup> Claims 3-6 have been withdrawn. (App. Br. 2).

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Niedwiecki

6,755,255 B1

Jun. 29, 2004

THE REJECTIONS

The following rejections are before us for review:

Claims 1-2 stand rejected under 35 U.S.C. § 103(a) over the  
combination of Mattiola and Niedwiecki.

We AFFIRM.

ISSUE

Have the Appellants established that the Examiner erred in  
determining that it would have been obvious to one of ordinary skill in the  
art at the time the invention was made to transport a transfilling station to  
and from a desired transfilling site as claimed?

FINDINGS OF FACT

The record supports the following findings of fact by a preponderance  
of the evidence.

1. Mattiola describes a method for loading liquid gases into a  
container, comprising: attaching the canisters to a filling system/pump;  
inspecting and evacuating the gas canister; vaporizing and compressing a  
gas and directing the gas into the canister; and disconnecting the gas  
canister. (Mattiola Abstract; col. 3, ll. 1-20).

2. Mattiola does not describe transporting the transfilling station to  
and from a desired transfilling site.

3. Niedwiecki describes portable hydrogen refueling stations.  
(Niedwiecki Abstract).

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4. Niedwiecki describes that “[l]arge semi-tanker/trailers for transporting gaseous fuels are also known in the art,” but are “not a *convenient* method for providing transportable hydrogen for refueling.” (*Id.* at col. 2 ll. 14-17) (emphasis added).

5. Niedwiecki describes that a small trailer suitable for towing by a passenger vehicle solves the limitations of a semi-tanker, including the requirement for a specialized driver’s license and potential restricted use on some roadways and access to some locations. (*Id.* at col. 2 ll. 17-23).

#### PRINCIPLES OF LAW

“A reference may be said to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant.” *In re Gurley*, 27 F.3d 551, 553 (Fed. Cir. 1994).

#### ANALYSIS

##### A. The Examiner’s Rejection.

Claims 1-2 stand rejected under 35 U.S.C. § 103(a) over Mattiola and Niedwiecki. Specifically, the Examiner found that Mattiola describes a system for inspecting, evacuating, vaporizing and compressing a gas, such as oxygen, into gas cylinders. (Final Rejection 2). The Examiner also found that Mattiola does not describe the concept of transporting the system to the filling site. (*Id.* at 2-3).

However, the Examiner found that Niedwiecki describes a mobile gas canister transfilling station, wherein the system is transported to the filling

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1 site. (*Id.* at 3). Therefore, the Examiner determined that it would have been  
2 obvious to a person of ordinary skill in the art at the time of the invention to  
3 modify the method of Mattiola by making the system mobile in view of the  
4 teachings of Niedwiecki to simplify the refilling of gas cylinders or vehicles  
5 for the end users by bringing the container to the filling site. (*Id.*).

6 B. The Appellants' Contentions.

7 The Appellants challenge the Examiner's rejection by asserting that  
8 "Mattiola expressly teaches away from portability of his transfilling station."  
9 (App. Br. 4). The Appellants assert that Mattiola describes a ground-based  
10 station having a "standard of operation involv[ing] transportation of the  
11 individual cylinders to and from the fixed ground-based transfilling station,  
12 as opposed to transportation of the station itself." (*Id.*) (citing Mattiola col.  
13 1 ll. 13-18). Therefore, according to the Appellants, Mattiola "does not  
14 envision his transfilling station as portable or mobile." (*Id.*).

15 This argument is unpersuasive. First, we observe that the Appellants  
16 have failed to identify the argued "express" teaching away of Mattiola.  
17 Rather, the Appellants' generically allege the conclusion and make a  
18 singular citation to Mattiola's description of the then prior art. (*See* App. Br.  
19 4) (citing Mattiola col. 1 ll. 13-18).

20 Mattiola describes using "large storage tanks" to refill cylinders.  
21 "Large," however, does not mean non-transportable. The Appellants have  
22 failed to establish that the description of using large storage tanks would  
23 lead one of ordinary skill in the art away from transporting the refill tanks.  
24 Mattiola does not warn that the storage tanks should not be moved. Nothing  
25 precludes Mattiola's tanks from being moved if it were desirable to do so.

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1           Therefore, we are not persuaded that a person of ordinary skill who  
2 read Mattiola would be discouraged or led away from the modification  
3 proposed by the Examiner. *See Gurley*, 27 F.3d at 553. Consequently, we  
4 do not find that the Appellants have established error on the part of the  
5 Examiner in this regard.

6           The Appellants also contend that the Examiner's proposed  
7 modification of Mattiola "would fundamentally alter the principal operation  
8 of Mattiola's system." (App. Br. 6). According to the Appellants, "the  
9 principal operation of Mattiola is to achieve an efficient *automated* refill  
10 system." (*Id.* at 5). According to the Appellants, "an attempt to make the  
11 Mattiola's automated ground-based system into an automated mobile system  
12 would be quite complicated and impractical, if not impossible." (*Id.* at 6)  
13 (emphasis omitted).

14           The Appellants also assert that "Niedwiecki does not teach that the  
15 vast amount of automation equipment utilized in Mattiola can be made  
16 portable within Niedwiecki's compact system, while simultaneously  
17 preserving Mattiola's automation features." (*Id.*). Therefore, the Appellants  
18 assert that "if Mattiola were to be modified, then automation would be lost  
19 for the sake of portability, and this would fundamentally alter the principle  
20 operation of Mattiola's system." (*Id.*).

21           These arguments are also unpersuasive.

22           To begin, the Appellants' assertion that Mattiola's system must be  
23 ground-based due to its "vast amount of equipment" is merely attorney  
24 argument and conjecture, not evidence.

25           Moreover, the argument is not relevant to the claimed subject matter.  
26 Instant claim 1 has no size limitations. The claim does not exclude

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1 transporting the transfilling station by any means (such as crane or tractor-  
2 trailer).

3 The Appellants have put forth no persuasive evidence that moving the  
4 Mattiola system would be “complicated and impractical, if not impossible.”  
5 (See App. Br. 8, Evidence App’x) (“There is no evidence being submitted  
6 pursuant to §§ 1.130, 1.131, or 1.132.”).

7 The Appellants have not established with persuasive evidence that  
8 Mattiola’s features must be lost to make its transfilling system and method  
9 portable in view of Niedwiecki. Consequently, we do not find that the  
10 Appellants have established that the Examiner erred in rejecting the claims  
11 as obvious.

12 In any event, preservation of the prior art system is not the goal in an  
13 obviousness analysis and is not required. The combined teachings of the  
14 prior art, coupled with the knowledge of one with ordinary skill, may well  
15 result in something different from the prior art system. In other words, a  
16 prior art reference must be considered for everything it teaches by way of  
17 technology and is not limited to the particular invention it is describing and  
18 attempting to protect. *EWP Corp. v. Reliance Universal Inc.*, 755 F.2d 898,  
19 907 (Fed. Cir. 1985). The use of patents as references is not limited to what  
20 the patentees describe as their own inventions or to the problems with which  
21 they are concerned. *In re Heck*, 699 F.2d 1331, 1333 (Fed. Cir. 1983).

22 Accordingly, we affirm the Examiner’s rejections.

#### 23 24 CONCLUSION OF LAW

25 On the record before us, the Appellants have not shown error on the  
26 part of the Examiner. It would have been obvious to one of ordinary skill in



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the art at the time the invention was made to modify a known method of  
transfilling gas canisters by transporting the transfilling station to and from a  
desired transfilling site in a known manner.

DECISION

The Rejection of claims 1-2 under 35 U.S.C. §103(a) as being  
unpatentable over Mattiola and Niedwiecki is AFFIRMED.

No time period for taking any subsequent action in connection with  
this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv) (2006).

AFFIRMED

nhl

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